No. 20-2310

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.
BENJAMIN JAKES-JOHNSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
No. 5:18-CR-261-1

BRIEF OF DUE PROCESS INSTITUTE AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a non-partisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Due Process Institute is a bipartisan, nonprofit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, it creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education. Since its founding, Due Process Institute has participated as an *amicus curiae* in a host of state and federal cases presenting critically important criminal legal issues.

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[1] Counsel for *Amici* provided notice to the parties of their intent to file an *amicus* brief on November 25, 2020. The parties have consented to the filing of this brief. Pursuant to Rule 29, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of the brief.

For both *amici*, the speedy trial issues raised by this case implicate our central mission: preserving the balance of power in the criminal justice system through meaningful enforcement of constitutional and statutory norms. We believe that extensive delays in bringing criminal cases to trial not only violate these norms but also contribute significantly to other systemic criminal justice challenges, such as the disappearance of jury trials and the overreliance on guilty pleas and plea-bargained testimony. Lengthy delays substantially increase the already-significant pressure to plead guilty by driving up the costs of defense and the length of pre-trial detentions. When routine, even simple, cases take three years to go to trial, the message to anyone accused of a crime is clear: despite the express speedy trial guarantee in the Sixth Amendment and the protections codified in the Speedy Trial Act of 1974, serious claims of delay (here, three years from arrest to trial) will not be treated seriously. They can be easily evaded through the most boilerplate of recitals. We believe it is fundamentally at odds with the law and is a problem this Court can and should address in this case.

PRELIMINARY STATEMENT

Amici agree with the Statement of Jurisdiction, the Statement of the Issues, and the Statement of the Case in the Brief of Appellant. *Amici* also agree with Appellant's Statement of Relevant Facts and Standard of Review. Here, we focus solely on the following critical and seemingly undisputed facts from the record, all

of which relate to the speedy trial rights at stake:

- On March 21, 2017, the government arrested appellant and filed a criminal complaint charging him with distributing and possessing child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2252A(a)(5)(B);
- The criminal complaint was accompanied by an 11-page affidavit from the investigating officer, which described (1) an already-conducted forensic analysis of electronic evidence, (2) a detailed investigation of appellant's background and undercover surveillance of his recent movements, (3) an interview of appellant in his home, conducted as the officer and his team were executing a search warrant; and (4) an apparent confession by appellant to the charged offenses;[2]
- The government detained Appellant for approximately 17 months before indicting him in August 2018; the indictment does not appear to contain any information not already in the government's possession as of the time of his arrest although much of the delay was attributed to the need to analyze electronic evidence secured during the home search;
- Despite having seemingly completed (or largely completed) its

[2] Criminal Complaint at 9, ¶ 30, *United States v. Jakes-Johnson*, Criminal No. 5:17-MJ-00115(TWD) (N.D.N.Y. Mar. 21, 2017), ECF No. 1.

investigation and obtained an apparent confession at the time of Appellant's arrest in March 2017, the government did not bring Appellant to trial until March 2020—*i.e.*, almost exactly 3 years after his initial arrest and approximately 18 months after his indictment;

- The pre-trial delay can be divided into three discrete phases:
    - Approximately 17 months (between appellant's arrest in March 2017 and his indictment in August 2018), to allow for the purported analysis of the electronic evidence by the government and plea negotiations;
    - Approximately five months (from the August 2018 indictment to January 28, 2019) to allow the defense to prepare its case, the examination of defendant by an expert in support of an insanity defense, and the disclosure of the defense expert report to prosecutors; and
    - Approximately 14 months (between January 29, 2019 and March 4, 2020) to allow the government to prepare its response to the asserted insanity defense through an expert examination and pre-trial motion practice;
- Before indictment, the defense stipulated to six boilerplate government continuance requests, presumably in the hopes of currying favor with the

government during plea negotiations;

- Each stipulation sought to justify the delay largely by reciting language from the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174, and specifically the "ends-of-justice" exception of 18 U.S.C. § 3161(h)(7)(B)(iv), stating vaguely that any delay was "necessary for effective preparation, taking into account the exercise of due diligence."[3] The stipulations then pointed to the need for additional time so that the prosecutor could analyze electronic evidence from the home search and/or for the parties to conduct plea negotiations. Each stipulation appears to have been granted by the court below with minimal review, often the day the stipulation was filed, using pre-printed form orders in which the district court filled in blanks for the new dates. The magistrate judge appears to have examined the final pre-indictment stipulation more closely and reduced it from 90 to 60 days after holding a telephonic

[3] Stipulation, *United States v. Jakes-Johnson*, Criminal No. 5:17-MF-00115(TWD) (N.D.N.Y. Apr. 17, 2017), ECF No. 4; Stipulation, *United States v. Jakes-Johnson*, Criminal No. 5:17-MF-00115(TWD) (N.D.N.Y. July 14, 2017), ECF No. 7; Stipulation, *United States v. Jakes-Johnson*, Criminal No. 5:17-MF-00115(TWD) (N.D.N.Y. Oct. 12, 2017), ECF No. 9; Stipulation, *United States v. Jakes-Johnson*, Criminal No. 5:17-MF-00115(TWD) (N.D.N.Y. Jan. 4, 2018), ECF No. 11; Stipulation, *United States v. Jakes-Johnson*, Criminal No. 5:17-MF-00115(TWD) (N.D.N.Y. Mar. 28, 2018), ECF No. 13; Stipulation, *United States v. Jakes-Johnson*, Criminal No. 5:17-MF-00115(TWD) (N.D.N.Y. June 22, 2018), ECF No. 15.

hearing;[4]

- After indictment, the main source of delay (approximately 14 months from the end of January 2019 through March 2020), involved government requests for additional time to address the proffered insanity defense. This period was also characterized by the routine granting of formatted extension requests, reciting the statutory "ends-of-justice" language.[5] Notably, this phase featured statements suggesting the district court believed that extensive trial delays were the cost of proffering the insanity defense and that not acceding to such delays would result in the court preventing the defense from being offered at trial.[6]

SUMMARY OF THE ARGUMENT

Amici will leave it to the parties to discuss the specifics of the constitutional and statutory speedy trial calculations that apply to this case. We write separately

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[4] Text Minute Entry, *United States v. Jakes-Johnson*, Criminal No. 5:17-MF-00115(TWD) (N.D.N.Y. June 28, 2018).

[5] *See, e.g.*, Order, *United States v. Jakes-Johnson*, Criminal No. 5:18-CR-261(TJM) (N.D.N.Y. Feb. 6, 2019), ECF No. 43.

[6] *See, e.g.*, Transcript of Telephone Conference at 19, *United States v. Jakes-Johnson*, No. 18-CR-261 (N.D.N.Y. Nov. 12, 2019), ECF No. 94 (Approximately one year after defense provided notice of insanity defense, the court stated to the prosecutor: "[I]f you go ahead and set up some kind of an examination for this guy, do it as fast as possible and we're going to take whatever speedy trial stipulations we can get to do that. If not, we're going to be going to trial, which may jeopardize the right of the defendant to put his defense in because I may not let him put it in if the government was frustrated somehow in not having the guy examined."); Minute Eentry, *United States v. Jakes-Johnson*, Criminal No. 5:18-CR-261(TJM) (N.D.N.Y. May 22, 2019) ("Court to reschedule the trial for a mid-July trial date if the parties submit a speedy trial stipulation.").

to emphasize that this case illustrates a widespread and recurring problem of delay in the criminal justice system. This case took three years to go to trial from the time of Appellant's arrest and detention in 2017. There does not appear to be anything special about this case that would warrant such a delay, and the only asserted grounds for any delay in this case appear to be rote assertions of plea negotiations, review of electronic evidence, and preparation of rebuttal evidence to the insanity defense raised by Appellant in response to the charges. There were no independent, on-the-record findings by the district court and no meaningful scrutiny of any of the relevant statutory factors.

While we also leave it to the parties to address whether the asserted grounds for delay existed at all, it is hard to see how they could reasonably justify the delays seen here. In fact, the original arrest warrant suggests that the government had secured most of what it needed at the time of arrest. There do not appear to have been significant plea negotiations and the government's preparation of its rebuttal appears to have taken far longer than the defense preparation of its own mental health and trauma evidence. If this case took three years to get from arrest to trial, and if these justifications are enough to satisfy the "ends of justice" exception, it is hard to imagine a case that would be compelled to move more quickly since the boilerplate justifications asserted here would be at least equally present in any criminal case.

Such delays prejudice the liberty interests of incarcerated defendants, who wait in prison for their trial to commence, increasing already-existing pressures for them to plead guilty to lesser charges. Such delays also diminish the quality of the trial itself, allowing memories to fade and eroding the public's confidence in the criminal justice system.

As we discuss below, legal authorities have long been in place to prevent these delays. These authorities date back to the Middle Ages, are expressly enshrined in the Sixth Amendment, and are the subject of detailed federal statutes. What appears to be lacking is the will to enforce them. *Amici* respectfully request that this Court take the opportunity to do so here, in a meaningful fashion, by reversing the judgment below.

ARGUMENT

I. The Constitutional and Statutory Speedy Trial Guarantees

At the time of the Framing, the promise of justice included an element of swiftness. The Sixth Amendment accordingly provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. In *Klopfer v. North Carolina*, the Supreme Court described the pedigree and importance of this "speedy" trial right:

> That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either

> justice or right'; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).

386 U.S. 213, 223 (1967).

As the Court went on to explain, "[t]he history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Id.* at 226; *see also Barker v. Wingo*, 407 U.S. 514 (1972) (articulating standards for review of Sixth Amendment speedy trial claims).

Although the Supreme Court has long recognized the importance of the Sixth Amendment speedy trial right, in the lower courts that right tends to be given more lip service than substance. The same year the Supreme Court decided *Klopfer*, the American Bar Association ("ABA") was finalizing recommended federal statutory speedy trial reforms that later found their way into the Speedy Trial Act of 1974.[7] The commentary accompanying the standards made clear that they were intended to vindicate both the defendant's interest in a speedy trial and the public's interest in swift justice.[8] As the ABA commentary explained,

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[7] Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, Fed. Jud. Ctr. at 5 (Aug. 1980), https://www.fjc.gov/sites/default/files/2012/LHistSTA.pdf (citing American Bar Association, Standards Relating to Speedy Trial (Approved Draft 1968)).

[8] The Framers also considered, and rejected, a proposal by Representative Burke of South Carolina to make the defense the sole guardian of speedy trial rights. Seth Osnowitz, *Demanding a Speedy Trial: Re-evaluating the Assertion Factor in the Barker v. Wingo Test*, 67 Case W. Res. L. Rev. 273, 277 (2016).

protecting the public interest meant that a demand by the defense for a speedy trial should not be required because "the trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge."[9]

The Speedy Trial Act of 1974 adopted this focus away from unilateral defense responsibility for ensuring a speedy trial and toward a system in which the Court and the government also had independent responsibilities for ensuring compliance with the public interest inherent in speedy trial protections. The ABA reforms also incorporated a number of other principles (time limits calculated in days or months running from a specified event; the exclusion of specified periods of necessary delay; a requirement that continuances be granted only upon a showing of good cause, taking into account not only the consent of the parties but also the public interest in prompt disposition of the case; and a sanction of dismissal (with prejudice)) that eventually found their way into the Speedy Trial Act of 1974 only a few years later.[10]

The Act itself arose during a process in which multiple players filled key supporting roles, including the United States Department of Justice ("DOJ"),

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[9] Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, Fed. Jud. Ctr. at 12 (Aug. 1980), https://www.fjc.gov/sites/default/files/2012/LHistSTA.pdf (quoting Commentary to ABA Standard 1.3).

[10] *See id*. (generally).

which expressed strong support for a faster process, and even endorsed a statutory dismissal remedy where the government was at fault for any delay. Understandably, the DOJ was concerned about the dismissal remedy in situations where the government was not at fault, but at the same time, then-Assistant Attorney General Rehnquist testified before Congress that:

> It may well be, Mr. Chairman, that the whole system of federal criminal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.[11]

Ultimately, Congress decided that the criminal justice system did in fact need to be "shaken by the scruff of the neck" when it passed the Speedy Trial Act a few years later.

II. The Supreme Court's Strict Construction of the Speedy Trial Act

Despite that clear congressional intent, however, the Speedy Trial Act's attempted jolt to the system, even in combination with the constitutional guarantee, did not produce the desired effect. Shon Hopwood, *The Not So Speedy Trial Act*, 89 Wash. L. Rev. 709, 719–29 (2014) (discussing historic failure of the Speedy Trial Act to reduce or eliminate delays). More than thirty years after passage of the Speedy Trial Act, in *United States v. Zedner*, 547 U.S. 489 (2006), the

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[11] *Id.* at 17 (quoting Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 107).

Supreme Court construed the law for the first time. *Zedner* involved seven years of pre-trial delay, stemming from the routine granting of several barebones continuance requests under the "ends of justice" exception, followed by an unlimited waiver of the defendant's speedy trial rights, signed by the defendant on a boilerplate form, which the district court had demanded as a condition of granting a defense motion for continuance. Trial was then delayed by several years due to various developments, including extensive inquiries into the defendant's competency to stand trial, and none of these delays was accompanied by any attempt to comply with the Speedy Trial Act.

After about five years had passed from the time of indictment, the defendant moved to dismiss, asserting his Speedy Trial Act rights. The district court denied the motion and, after two more years, the defendant was convicted of bank fraud and sentenced. This Court affirmed, both upholding the blanket waiver and expressing doubt that the public interest would be served by a rule that would allow a defendant to request a delay and then protest the granting of their own request. *United States v. Zedner*, 401 F.3d 36, 39 (2d Cir. 2005).

In a unanimous opinion authored by Justice Alito, the Supreme Court reversed. The Court began by explaining that "[t]he [Speedy Trial] Act generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance, § 3161(c)(1), but the Act contains a detailed

scheme under which certain specified periods of delay are not counted." *Zedner*, 547 U.S. at 492. The Court noted that ends-of-justice continuances, allowed by 18 U.S.C. § 3161(h)(7)(a), provide district courts with flexibility, but require judges to carefully review those requests so that resulting delays will be excluded from the time frames only if the district court, "after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial." *Id.* at 498–99.

Rejecting the notion that the defendant's acquiescence to these delays defeated his claims, the Court noted that Congress also wanted to provide both the prosecution and the judiciary with "a powerful incentive to be careful about compliance." *Id.* at 499. In the end, the Court concluded that the Speedy Trial Act did not allow for blanket waivers, as those would vitiate the public interest in speedy trials. *Id.* at 500–03.

The Court further concluded that the ends-of-justice exception could only be met through meaningful on-the-record determinations, and that the failure to make such findings could never constitute harmless error. The reasoning is important:

> [I]t is . . . clear that Congress, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme. The strategy of § 3161(h)(8), then, is to counteract substantive openendedness with procedural strictness. This provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings. Excusing the failure to

> make these findings as harmless error would be inconsistent with the strategy embodied in § 3161(h).

Zedner, 547 U.S. at 508–09; s*ee also Bloate v. United States*, 559 U.S. 196 (2010) (rejecting argument that time for motion preparation is automatically excluded from Speedy Trial Act calculation).

III. This Relatively Simple Criminal Case, Which Took Three Years to Get to Trial, Illustrates That, Although Congress and the Framers of the Constitution Attempted to Guarantee the Right to a Speedy Trial, They Have Not Yet Succeeded

This case illustrates that despite strenuous efforts by the Framers, by Congress and by the Supreme Court, significant trial delays routinely occur—aided and abetted by precisely the ends-of-justice continuances that Congress feared could get "out of hand." In fact, this case represents a paradigmatic example of what the Speedy Trial Act was designed to *prevent.* At the time of arrest, the government already had substantial electronic evidence that it believed showed commission of a crime, it had what it viewed as a confession to a crime, and it had the defendant in custody awaiting trial. This is, in short, a case whose investigation was largely complete at the time of arrest.

Nonetheless, the system allowed a series of formulaic ends-of-justice continuances to be used over and over until three years had passed with the result being that a relatively simple criminal case could not be brought to trial in less than three years. If this sort of poorly justified delay is permissible, it is hard to imagine

when a speedier trial would be required, in derogation of the Speedy Trial Act.

As this case makes clear, the system still needs to be "shaken by the scruff of the neck" because the expressed intent of Congress to provide such a "shake" with the Speedy Trial Act remains unfulfilled nearly 50 years after its passage. As explained below, that problem cannot be unwound or fixed in a vacuum. To the contrary the problem of insufficiently speedy trials is exacerbated by other systemic problems in the criminal justice system, and the speedy-trial concerns raised by this case likely cannot be remedied without some consideration of those other issues.

IV. The Speedy Trial Issues Presented by This Case Were Exacerbated by Other Systemic Failings of Our Criminal Justice System, Such as Overreliance on Plea Bargaining, Failure to Apply Principles of Common Sense to the Use of Electronic Evidence, and the Trial Court's Having Conditioned the Right to Present a Defense on the Waiver of Speedy Trial Rights

Why did it take so long for this case to get to trial? The most basic reason is the failure of the district court and the prosecutor to take ownership of their obligation to ensure compliance with speedy trial guarantees, and the defense's acquiescence to these delays through multiple stipulated "ends-of-justice" continuances before indictment, and additional continuances as the price of putting on a defense after indictment. But as this case illustrates, these failings cause particular damage when viewed in combination with other systemic criminal-justice shortcomings, three of which contributed heavily to the delay in this case

and in many other similar cases.

First, our criminal justice system is currently configured to strongly encourage and induce—some would even say coerce—plea bargaining. *See, e.g.*, Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason L. Rev. 719, 725–26 (2020) (arguing that plea bargaining in the U.S. has become pervasively coercive and collecting examples of judges and even prosecutors acknowledging that fact). The combination of multiple available criminal charges on the same set of facts, combined with increasingly harsh sentences, create strong incentives for the accused to accept a deal with the government. *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012) ("The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain." (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1138 (2011)); *see also* Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 Alb. L. Rev. 919, 925 (2015–16); Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship between Plea Bargaining and Overcriminalization*, 7 J.L. Econ. & Pol'y 645 (2011). Through this dynamic of overlapping charges and excessive sentences, the accused is often placed at the mercy of the government's

discretion—discretion to streamline the charges and/or the available sentence in exchange for the waiver of trial rights and potential cooperation by the defendant in other investigations. But because this system places defendants at the mercy of prosecutors, there is every incentive for the defense to accede to prosecution requests for more time. Given the likelihood of an extreme sentence should an accused pursue the trial right and not succeed,[12] virtually no one wants to risk losing the possibility of mercy or leniency by opposing a prosecution continuance request. Indeed, even incarcerated defendants will often agree to additional continuances in the hope of future mercy in the form of a reduced charge or sentence.

The reality, then, is that the party with the most incentive to speed plea bargaining along—an incarcerated defendant—has no leverage with which to do so and a countervailing (but understandable) reluctance to take steps that might interfere with the prosecutor's willingness (or apparent willingness) to provide mercy. And the prosecutor, who has all the leverage, has little incentive to proceed with dispatch, as the longer the defendant remains incarcerated, the more desperate he or she becomes to take a plea deal. As one commentator has noted, "[d]elay is a federal prosecutor's friend. The longer the delay, the greater the chance a

[12] For example, after going to trial and losing, the Guideline range for appellant in this case was 30 to 100 years. The government advocated for a sentence of 30 years. Government's Sentencing Memorandum at 3, *United States v. Jakes-Johnson*, No. 5:18-CR-261 (TJM) (N.D.N.Y. June 24, 2020), ECF No. 162.

prosecutor has to flip a co-defendant into a cooperating witness through a negotiated plea deal." Shon Hopwood, *The Not So Speedy Trial Act*, 89 Wash. L. Rev. 709, 739 (2014). Thus, even though plea bargaining in most cases, including this one, could be accomplished in a matter of weeks or certainly a few months, the reality is that lengthy delays for plea bargaining are common.

Enforcement of speedy trial rights—through more careful review of assertions that additional time is needed for plea bargaining—could easily right this imbalance. If there is a deal to be had, it should be completed within a short period of time. Certainly, it is difficult to understand why plea negotiations would take 17 months to complete in a case like this one. But without more scrutiny by courts, these sorts of delays will inevitably continue because the promise of future negotiations will almost always be enough to convince the defense to agree to future continuances, and a prosecutor can always take advantage of additional delay.

Second, the potential need to review and analyze electronic evidence is often asserted and cited without scrutiny as a justification for lengthy trial delays. While there are some cases in which such a justification would undoubtedly withstand scrutiny, much more often, the opposite is true. There is always more information that could be reviewed, but the mere possibility of additional electronic evidence should not automatically justify lengthy delays. Indeed, cases like this one show

why there is a need to exercise reasoned judgment and judicious balance in the face of generic requests for more time to analyze electronic evidence. Here, the criminal complaint and accompanying affidavit demonstrate that the government had already reviewed and analyzed a plethora of electronic evidence by the time of the arrest, and that it had a significantly developed case at that time. While the government obviously had not reviewed the information obtained during the arrest and accompanying home search at the time of the arrest, it is hard to imagine why most of that information would not have been cumulative, especially in light of the purported confession that occurred at the time of arrest as well. Even assuming, however, that the government obtained non-cumulative evidence during the arrest-related search beyond that already described in the affidavit, it is difficult to understand why the government would have needed 17 additional months to develop this new electronic evidence before securing even an indictment—especially when the government itself originally estimated it would need only 90 days to review that evidence.

Third, as this case also demonstrates, careful judicial scrutiny must be applied as well to government requests for substantial delay to respond to affirmative defenses, particularly mental health defenses. Here, Appellant appears to have identified and developed at trial evidence suggesting he had suffered tragic, traumatic events in his past, which may (or may not) have contributed to the

criminal conduct that occurred in this case. While the trial court correctly determined that Appellant was entitled to present such a defense, the court also seemed to suggest that the presentation of that evidence must necessarily come at overwhelming cost, necessitating a virtual waiver of his speedy trial rights so that the government could take over a year to respond.

But the raising of an affirmative defense should not be viewed as a blank check for delay by the government. Indeed, given that the government as a practical matter controls access to incarcerated defendants (presenting substantial challenges to the defense in the preparation of any mental health defense), and given that the government receives an expert report at the end of the defense process so that it is not starting from scratch, the government should arguably be allowed substantially less time to prepare its rebuttal case. But at the very least, when such a defense is developed and asserted, district courts should at least apply a rule of parity in terms of time frames for the government to develop its rebuttal evidence. Here, by contrast—and in many other similar cases—the district court seemed to view the defense proffer of a mental health defense as a license for virtually unlimited delay, allowing the government a much longer period to respond than the defense took to develop the defense in the first place.

V. This Court Should Direct Lower Courts to Take Speedy Trial Rights More Seriously by Scrutinizing Continuance Requests and Rejecting Inadequate and Insufficiently Particularized Justifications

The preceding discussion demonstrates that excessive trial delays are a longstanding, nationwide problem that can only be remedied through more robust judicial scrutiny of Speedy Trial Act requests. And what is true of the system as a whole is true of this Circuit in particular. As Appellant's brief notes, (Def.-Appellant Br. 47–48), this Court has frequently faced the issue of repeated rubber-stamping of boilerplate "ends-of-justice" continuance requests and has labeled such practices "troubling." *See, e.g.*, *Parisi v. United States*, 529 F.3d 134 (2d Cir. 2008); *Sharpley v. United States*, 355 F. App'x 488, 491 (2d Cir. 2009) (summary order).

The solution cannot lie in more admonitions or expressions of concern by courts of appeals. Nor must the problem be remedied by Congress, as the Speedy Trial Act of 1974 has long forbidden the sorts of trial delays presented by this case. Instead, the message will be received only when this Court acts to "police trial courts by reversing convictions" that fail to follow the letter and spirit of the Speedy Trial Act. Shon Hopwood, *The Not So Speedy Trial Act*, 89 Wash. L. Rev. 709, 743–44 (2014). That message from this Court is plainly needed because the parties have strong incentives for delay, and district courts do not have sufficient incentives to police their dockets when "they can rest assured that their actions will

be upheld by reviewing courts in all but the most egregious abuses." *Id.* at 739. If reviewing courts do not act, the problem will continue unabated, frustrating the intent of the Framers and of Congress, and frustrating—or, more precisely, continuing to frustrate—the strong public interest in speedy trials.

CONCLUSION

For the foregoing reasons and those advanced by Appellant, the Court should reverse the district court's judgment.

December 7, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 5,240 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Timothy P. O'Toole
Timothy P. O'Toole

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of December 2020, I caused this Brief Of Cato Institute and Due Process Institute as *Amici Curiae* In Support Of Appellant to be filed via the CM/ECF filing system, which will then send notification of such filing to all counsel of record.

/s/ Timothy P. O'Toole
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